No. 256

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In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

J. THOMAS MILEY,
Petitioner,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

LEO T. KISSAM,
Counsel for Petitioner,
120 Broadway,
New York 5, N.Y.

Of Counsel:
KISSAM & HALPIN,
New York, New York,
DEVINE, YORK & VOLPE,
Boston, Massachusetts.

INDEX

Opinions below 2

Jurisdiction 2

Questions presented 2

Statutes involved 3

Statement 5

Reasons for granting the writ 12

I. The Sherman Act applies to insurance in states which have not enacted Sherman Act type statutes covering insurance; the Massachusetts statutes relied on by the Courts below do not foreclose private actions under the Sherman Act 14

A. State Sherman Act type statutes are essential under the McCarran Act 14

Plain meaning of the McCarran Act 15

Legislative history of McCarran Act 17

Actions by state Legislatures 20

B. The Sherman Act applies to the insurance business in Massachusetts 23

II. The holding that section 4 of the Clayton Act does not afford a remedy to petitioner is in direct conflict with decisions of Courts of Appeals for other Circuits and disregards a recent admonition of this Court 29

III. Dismissal of the complaint against defendant Commission members was the result of an erroneous application of decisions of this Court 32

Conclusion 34

Appendix A — Massachusetts Statutes 35

B — States Having No Sherman Act type statute Applicable to Insurance Business 46

C — States Having Sherman Act type statute Applicable to Insurance Business 48

Citations

Cases

American Hospital and Life Insurance Company v. Federal Trade Commission, 1957 (C.C.H.) Trade Cases, par. 68,675 (5th Cir.—April 9, 1957) 27

Ayers, Ex parte, 123 U.S. 443 (1887) 34

Congress Building Corporation v. Loew's Incorporated, 1957 (C.C.H.) Trade Cases, par. 68,725 (7th Cir.—May 31, 1957) 31

Ex parte Ayers, 123 U.S. 443 (1887) 34

Hagood v. Southern, 117 U.S. 52 (1886) 34

Harrison v. Paramount Pictures, Inc., 115 F. Supp. 342 (D.C.—E.D. Pa.—1953); aff'd on opinion below 211 F. 2d 405 (3rd Cir.—1954); cert. den. 348 U.S. 828 (1954) 30,31

Klein v. Sales Builders, Inc., 1950-1951 (C.C.H. Trade Cases, par. 62,950 (D.C.—N.D. Ill.—1951) 32

McWhirter v. Monroe Calculating Mach. Co., Inc., 76 F. Supp. 456 (D.C.—W.D. Mo.—1948) 32

Melrose Realty Co., Inc., v. Loew's, Inc., 234 F. 2d 318 (3rd Cir.—1956) 30, 32

Minnesota v. Hitchcock, 185 U.S. 373 (1902) 34

National Casualty Co. v. Federal Trade Commission, 25 U.S. Law Week 2597 (6th Cir.—June 6, 1957) 27

Parker v. Brown, 317 U.S. 341 (1943) 33
Productive Inventions, Inc., v. Trico Products Corp., 224 F. 2d 678 (2nd Cir.—1955) 30, 32
Radovich v. National Football League, 352 U.S. 445 (1957) 6, 30, 31
Rossland v. Phister Mfg. Co., 125 F. 2d 417 (7th Cir.—1942) 29, 30, 32
Snow Crest Beverages, Inc., v. Recipe Foods, Inc., 147 F. Supp. 907 (D.C.—D. Mass.—1956) 30
Steiner v. 20th Century-Fox Film Corp., 232 F. 2d 190 (9th Cir.—1956) 31
United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) 6, 12, 13, 14
Vines v. General Outdoor Advertising Co., 171 F. 2d 487 (2nd Cir.—1948) 32
Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937) 33

STATUTES

McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq.*
3, 4, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 20, 23, 24, 26, 27, 28
Sherman Anti-Trust Act, 15 U.S.C. §1 2, 3, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34
Clayton Act, 15 U.S.C. §15
2, 3, 6, 13, 14, 15, 26, 27, 28, 29, 31
28 U.S.C. § 1254 (1) 2
Mass. General Laws (Ter. Ed.) c. 32A
5, 6, 10, 24, 26, 27, 28, 33
Mass. General Laws (Ter. Ed.) c. 93, §2 4, 20*n.*
Mass. General Laws (Ter. Ed.) c. 174A-178 11*n.*, 23*n.*
Mass. General Laws (Ter. Ed.) c. 176D 5, 11, 23*n.*, 25
N. Y. General Business Law, §340 20, 21, 23

Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* 15, 26, 27
U.S. Constitution, Amendment XI 32

MISCELLANEOUS

1947 Ops. Atty. Gen. (N.Y.) 200 20
N. Y. Legislative Documents, 1948, Vol. 7, Document No. 46, pp. 35-36 21
H. R. Rep. No. 143, 79th Cong., 1st Sess., p. 3 17
91 Cong. Rec. 1442-1444 (1945) 18, 19
The Life Insurance Fact Book—1957 13*n*.

In the
Supreme Court of the United States.

OCTOBER TERM, 1957.

J. THOMAS MILEY, *Petitioner*,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON MUTUAL LIFE INSURANCE COMPANY, COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, LOYAL PROTECTIVE LIFE INSURANCE COMPANY, MONARCH LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PAUL REVERE LIFE INSURANCE COMPANY, STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER, CLARENCE W. WYATT, EDWARD A. GREEN, ALAN R. WILLISON, JOHN HILL, THEODORE W. FABISAK, JOSEPH A. HUMPHREYS, JOHN M. DEELY, HORACE GOOCH, JR., and CARL A. SHERIDAN, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

J. THOMAS MILEY prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on April 11, 1957.

Opinions Below.

The memorandum opinion of the District Court, printed at pages A28-A33 of the Record Appendix, is reported in 148 F. Supp. 299. The one-sentence *per curiam* opinion of the Court of Appeals for the First Circuit, printed at page A36 of the Record Appendix, is reported in 242 F. 2d 758.

Jurisdiction.

The judgment of the Court of Appeals, printed at page A36 of the Record Appendix, was entered on April 11, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

The Court of Appeals affirmed in a one-sentence *per curiam* opinion the holding of the District Court that an action for treble damages for a violation of the Sherman Act in the insurance business may not be maintained in the Federal Courts of Massachusetts. The result of the holding, if followed in the thirty-one states similarly situated, is to deprive persons in two-thirds of the states of any relief whatsoever when injured by a violation of the Sherman Act in the insurance business. The questions presented are:

1. Can persons injured by violations of the Sherman Act in the insurance business be deprived of any relief whatsoever by state statutes which authorize a state commission to purchase insurance for state employees or regulate only some phases of the insurance business but which do not prohibit monopolies and restraints of trade or commerce in the insurance business?

2. Is a complaint under Section 4 of the Clayton Act sufficient if it alleges that an established insurance broker

was injured in his business through the loss of commissions and service fees which he would have received except for a violation of the Sherman Act by the defendants?

3. Are members of a State Commission, acting as state purchasing agents, who, without statutory authority, participate in a combination and conspiracy violative of the Sherman Act, individually liable in an action for treble damages for violation of the Sherman Act?

Statutes Involved.

The statutory provisions involved are as follows:

Sherman Act, 15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

Clayton Act, 15 U.S.C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

McCarran-Ferguson Act, 15 U.S.C. § 1012:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the

several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

McCarran-Ferguson Act, 15 U.S.C. § 1013:

"(a) * * *

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

The Massachusetts statutes involved, the pertinent provisions of which are printed in Appendix A hereto, may be summarized as follows:

Massachusetts General Laws (Ter. Ed.) c. 93; Section 2:

This section, enacted in 1908, declares void every contract, agreement, arrangement, combination or practice, whereby a monopoly or restraint of competition in "any article or commodity in common use" is created. The section does not specifically apply to the insurance business, as similar statutes in some states do, nor could it be

construed to apply to the insurance business in the light of the settled law at the time it was enacted.

Massachusetts General Laws (Ter. Ed.) c. 32A:

This chapter was enacted to provide a program of group insurance for state employees. It established a special unpaid commission to carry out this purpose and directed the commission to purchase the necessary insurance. It does not, as is required by the McCarran-Ferguson Act, regulate the "business of insurance."

Massachusetts General Laws (Ter. Ed.) c. 176D:

This chapter is the Massachusetts Unfair Trade Practices Act relating to the business of insurance. It defines certain unfair methods of competition and unfair and deceptive trade practices, none of which are here involved; an "omnibus" provision is included in the chapter to cover undefined and unspecified trade practices. The Commissioner of Insurance, (a defendant here) is vested with authority to administer and enforce the Act.

Statement.

This case presents for the first time in this Court the question of the extent to which states must regulate the business of insurance under the permission granted by the McCarran-Ferguson Act* (Act of March 9, 1945, c. 20, 59 Stat. 33, 15 U.S.C. § 1011 *et seq.*) in order to foreclose Federal jurisdiction of an action for treble damages for a violation of the Sherman Act. If the holding below is followed in states similarly situated, the Sherman Act will not apply to the business of insurance in states which have regulated that business even to the slightest degree de-

*Hereinafter referred to as the McCarran Act.

spite the fact that no Sherman Act type statute protecting the public against unlawful combinations or conspiracies in restraint of trade in the insurance business exists in those states. Plaintiffs in thirty-two states who are injured by violations of the Sherman Act in the insurance industry are left completely without any type of relief; the giant insurance industry, on the other hand, is returned to the privileged status of freedom from the Sherman Act which it was thought to enjoy prior to the *South-Eastern Underwriters* decision[4]; the Congressional intent in enacting the McCarran Act is ignored.

Plaintiff, an established insurance broker, licensed for many years in the States of Massachusetts, Maine and New Hampshire, brought this treble damage action for violation of the Sherman Act against eight insurance companies,[5] four officers of such companies and five individuals, members of the Massachusetts State Employees' Group Insurance Commission (hereinafter called the "Commission"). Jurisdiction of the District Court was invoked under Section 4 of the Clayton Act (15 U.S.C. § 15). The District Court allowed defendants' motions to dismiss on the ground that the complaint fails to state a claim upon which relief may be granted. The allegations of the complaint, which for the purpose of such motions must be accepted as true (*Radovich v. National Football League*, 352 U.S. 445 (1957)), may be summarized as follows:

During 1955 the Massachusetts Legislature enacted chapter 628, Acts of 1955[6] (now General Laws (Ter. Ed.) c. 32A), for the express purpose of providing a program of group insurance coverage for approximately 32,000

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[4] *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

[5] Massachusetts corporations, seven of which were licensed to do business in New York.

[6] Approved August 3, 1955; effective ninety days thereafter.

state employees. The Commission was established and made responsible for the administration of the Act; it was empowered to negotiate for and purchase the insurance policies necessary to carry out the purpose of the Act.

The Commission published and made available to insurance companies and brokers generally "An Invitation to All Insurance Companies Licensed To Do Business in Massachusetts." The invitation contained the specifications of the insurance to be provided and fixed December 1, 1955, as the closing date for bids. Under the specifications three types of bids were allowed: (1) life, accidental death and dismemberment insurance, or (2) hospital, surgical and medical insurance, or (3) a combination of (1) and (2).

Plaintiff, in response to said invitation, prepared and submitted (as permitted under (3) above) a joint bid on behalf of Minnesota Mutual Life Insurance Company* (hereinafter called "Minnesota"), Massachusetts Hospital Service, Inc. (hereinafter called "Blue Cross"), and Massachusetts Medical Service (hereinafter called "Blue Shield"), the latter two being well-known Massachusetts corporations. Eighteen other bids were submitted, among them one submitted by defendant John Hancock Mutual Life Insurance Company (hereinafter called "Hancock"), on behalf of all defendant insurance companies except Boston Mutual Life Insurance Company (hereinafter called "Boston").

Plaintiff's bid on the life, accidental death and dismemberment portion of the insurance, involving coverage of $128,000,000.00 was at a rate of ninety cents ($0.90) per thousand dollars insurance per employee per month. The bid submitted by Hancock on behalf of all defendant in-

*A Minnesota corporation, licensed to do business in Massachusetts, having about seventy-five years' experience in the insurance field and assets of over $200,000,000.00.

surance companies (except Boston) was at a rate of one dollar and twenty cents ($1.20) per thousand dollars insurance per employee per month for the same coverage.

Defendant companies (except Boston) in developing their rate for this portion of the insurance were required by New York law to use rate schedules filed by them in New York; failure to do so would subject them to penalties in New York which in all probability would mean suspension of their licenses to do business in New York. Therefore, their bid of one dollar and twenty cents ($1.20) per thousand dollars of insurance was the lowest bid they could submit. Bidding closed on December 1, 1955. Defendant Commission members immediately informed certain of the other defendants that the $128,000,000.00 insurance coverage on the life, accidental death and dismemberment portion on which plaintiff had submitted the lowest bid should be awarded to plaintiff's principal, Minnesota.

Thereupon defendant Commission members and the individual defendants engaged in a conspiracy to prevent plaintiff's bid from being accepted and to obtain the life, accidental death and dismemberment portion of the insurance for the defendants (except Boston). In furtherance of the conspiracy, they met secretly outside the Commission offices (although the Commission had ample office facilities in the State House) to devise ways and means to carry out the conspiracy. Defendant Commission members realized that the coverage offered by Blue Cross and Blue Shield in plaintiff's bid could not be duplicated elsewhere, so they inquired of a representative of those companies whether the same coverage at the same premium would be offered if defendant companies (except Boston) were awarded the life, accidental death and dismemberment portion of the insurance instead of plaintiff's principal Minnesota. Blue Cross and Blue Shield were willing

to offer the same coverage at the same premium only if defendant companies (except Boston) would quote a rate of ninety cents ($0.90) per thousand dollars insurance per employee per month. Defendant Commission members communicated this information to certain other defendants and a meeting of conspirators was held on a Sunday morning in the offices of defendant Hancock. At the meeting the conspirators discussed methods of eliminating plaintiff's principal, Minnesota, as a competitor and also the division of the business if the conspiracy succeeded. The conspirators finally agreed that defendant State Mutual Life Assurance Company of Worcester (hereinafter called "State") would submit a new bid of ninety cents ($0.90) even though State would thereby violate New York law and risk suspension of its license to do business in New York. In accordance with this plan, State arranged with defendant Commission members to submit the new bid, and did so, but, after a conference with the New York State Insurance Commissioner, State withdrew its bid.

When the conspiracy was thwarted by State's withdrawal of its bid, defendants, including the Commission members, devised a new scheme to accomplish their conspiracy of preventing the contract from being awarded to plaintiff. Defendant Boston, which had never written any casualty or group life insurance and consequently had not filed any group life insurance rate schedules in New York State (a fact known to all defendants), was brought into the conspiracy. As consideration for Boston's joining the conspiracy, defendant Hancock agreed to loan to Boston the trained employees needed by Boston to set up a department to carry out the work involved when the contract was obtained from the Commission. Boston as its part of the conspiracy agreed that, after the contract was executed with the Commission, 95 per cent of the total amount of insurance covered by the contract would be allotted to the

other defendant insurance companies by way of reinsurance. Pursuant to the conspiracy the contract was awarded to defendant Boston, which in turn gave 95 per cent of the business under the contract to the other corporate defendants.

As a result of this illegal conspiracy among the defendants, commerce was restrained, free competition was eliminated and competitive bidding was discouraged; plaintiff, the victim of the conspiracy, was deprived of the commissions and service fees he would have obtained on the contract and the commissions and service fees he would have obtained on new business which Minnesota could reasonably expect to obtain in Massachusetts and other states as a result of having this sizable contract with the State of Massachusetts.*

The District Court allowed defendants' motions to dismiss the complaint. The Court in its opinion assumed that what was done here by the defendants was a "conspiracy or combination violative of the Sherman Act" (A30), but held that plaintiff was without a remedy in the Federal Courts because "it was nevertheless done in the course of negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided [in the McCarran Act] that the Sherman Act shall not apply" (A30). The Massachusetts statute upon which the Court primarily relied (Mass. Gen. Laws (Ter. Ed.) c. 32A) does not purport to regulate "the business of insurance" as is required by the McCarran Act; its sole purpose, as is specifically provided in Section 1 of the

*50 per cent of the premiums for the insurance was to be paid by the 32,000 state employees and 50 per cent by the state; any dividends or other refunds or rate credits were payable solely to the state (Mass. Gen. Laws (Ter. Ed.) c. 32A, Sections 8 and 9). Therefore, as a result of the conspiracy, the state employees and all taxpayers of the state were deprived of the benefits of free competitive bidding, and future competitive bidding by insurance companies, other than Massachusetts companies, was discouraged.

statute (Appendix A, p. 35), is to provide a program of insurance for certain state employees and their dependents. The statute does nothing more than authorize the Commission to act as a purchasing agent to procure the insurance.

As an additional ground for holding that plaintiff has no remedy under the Sherman Act because of state regulation, the Court relied on Massachusetts General Laws (Ter. Ed.) c. 176D* (Appendix A, pp. 42-45). This chapter is the Massachusetts Unfair Practices Act covering the insurance business; it does not declare illegal, as the Sherman Act does, every contract, combination or conspiracy in restraint of trade; it simply defines eight unfair methods of competition and unfair and deceptive acts or practices, and provides that other undefined and unspecified trade practices may be enjoined through an action by the state Attorney General.

Aside from its reliance on the McCarran Act, the Court also held that the injuries alleged by plaintiff "seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15" (A32).

Finally, as to defendant Commission members, the Court held that (1) the action is in substance one against the state and hence the Court has no jurisdiction and (2) the Sherman Act does not apply to activities of state officers "directed by the state legislature" (A33).

The District Court's Order of Dismissal was entered January 18, 1957 (A33). The United States Court of Appeals for the First Circuit, in a one-sentence *per curiam* opinion, affirmed the District Court decision (A36), and its judgment was entered April 11, 1957 (A36).

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*The Court stated that Massachusetts "provides a comprehensive statutory scheme for the regulation of all phases of the insurance business, Mass. G. L. Ch. 174A through 178" (A30), but did not discuss any of these chapters other than chapter 176D.

Reasons for Granting the Writ.

The instant case presents questions of significant importance in the correct interpretation of the McCarran Act, enacted by Congress to offset the effect of this Court's decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which established that the business of insurance was subject to the Sherman Act. The McCarran Act granted to the states a three-year moratorium during which they could by legislation occupy the field covered by the Sherman Act, in so far as it applied to the insurance business, and thereby oust the Federal Courts from jurisdiction. Three alternatives were open to the states:

1. Authorize (by statute) acts or conduct in the insurance business which, without legislation, would violate the Sherman Act.
2. Enact new (or amend existing) Sherman Act type statutes applying to the insurance business.
3. Fail to act, in which event the Sherman Act would apply at the end of the moratorium.

Regardless of which alternative was followed, the citizens were to be protected and the relief afforded by the Sherman Act was to continue in all areas not covered by state legislation.

The Courts below, however, have created a vacuum never intended by Congress; under the holding below, if allowed to stand, citizens receive no protection in states which have neither authorized conduct in violation of the Sherman Act nor enacted Sherman Act type statutes prohibiting combinations or conspiracies in restraint of trade or commerce. As a result citizens of thirty-two of the

forty-eight states are without any relief* whatever from violations of the Sherman Act in the insurance business: they are at the mercy of the giant insurance industry.

The business of insurance affects practically every citizen of the United States. At the close of 1956, the total coverage of life insurance *only* in the United States approached $475,000,000,000.00.† This Court in *South-Eastern Underwriters* case, *supra*, described the insurance industry as "one of the largest and most important branches of commerce." The holding below restores this industry to the favored position it was thought to enjoy prior to the decision in the *South-Eastern Underwriters* case, *i.e.*, unfettered by the prohibitions of the Sherman Act which apply to practically all other businesses. The plain intent of Congress—that the Sherman Act should apply to the insurance business to the extent that the states have not affirmatively acted to protect the public, is thwarted.

This case squarely presents for the first time in this Court the question of the extent to which the states, under the McCarran Act, must regulate the insurance business to exempt it from the application of the Sherman Act. It is our contention that the McCarran Act requires affirmative specific state legislation similar to the Sherman Act to accomplish this purpose and that, since Massachusetts has failed to enact such legislation, the Courts below erred in holding that petitioner cannot maintain this action for treble damages pursuant to the Clayton Act.

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*As demonstrated within, pages 17 to 20, Congress intended that the antitrust laws would still apply as to any ground thereof not covered by state legislation. Under Section 4 of the Clayton Act a person injured by reason of anything forbidden by the antitrust laws may sue for triple damages. Yet here such a right to sue has been avoided.

†"The Life Insurance Fact Book—1957" published by the Institute of Life Insurance Companies, 488 Madison Avenue, New York, N.Y.

A further question of equal importance is presented here. The Courts below have held that petitioner cannot maintain this action under the Clayton Act because the injuries alleged in the complaint "seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15" (A32). This holding is in direct conflict with decisions of Courts of Appeals in other Circuits and is contrary to the express language of the Clayton Act giving a cause of action for treble damages to *any person* injured by a violation of the antitrust laws.

Finally, under the holding below, defendant Commission members are being allowed to escape responsibility for a violation (non-official action) of the Sherman Act despite clear holdings to the contrary by this Court.

I.

THE SHERMAN ACT APPLIES TO INSURANCE IN STATES WHICH HAVE NOT ENACTED SHERMAN ACT TYPE STATUTES COVERING INSURANCE; THE MASSACHUSETTS STATUTES RELIED ON BY THE COURTS BELOW DO NOT FORECLOSE PRIVATE ACTIONS UNDER THE SHERMAN ACT.

A. State Sherman Act type statutes are essential under the McCarran Act.

On June 5, 1944, this Court, in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, held that the business of insurance was commerce; that, when conducted across state lines, it was interstate commerce and therefore subject to the Sherman Act. Thereafter Congress, in 1945, enacted the McCarran Act. Under this Act, the Sherman Act and related Acts were made inapplicable to the business of insurance until January 1, 1948.* How-

*By amendment in 1947 the moratorium was extended to June 30, 1948 (Act of July 25, 1947, c. 326, 61 Stat. 448).

ever, the Act specifically provides that, at the end of the moratorium, the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law." It is this portion of the statute just quoted which urgently requires clarification and interpretation by this Court.

Two-thirds of the states (see Appendix B) either have no Sherman Act type statutes or have Sherman Act type statutes which do not, either by the terms of the statute or by case law, specifically apply to the business of insurance. Massachusetts is among this group of states. The remaining one-third of the states (see Appendix C) have Sherman Act type statutes which do apply to the business of insurance.

It is obvious from the express language of the McCarran Act, from its legislative history and from the action of several state Legislatures subsequent to the enactment of the McCarran Act, that, without state Sherman Act type legislation, the Federal Courts continue to have jurisdiction over Sherman Act violations.

Plain meaning of the McCarran Act.

The provisions of the McCarran Act which are particularly pertinent here are found in 15 U.S.C. § 1012 (b), which provides:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as

amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The plain and unmistakable meaning of the proviso in the quoted section is that, after June 30, 1948, the Sherman Act is fully applicable to the business of insurance except to the extent that that business has been regulated by state law. If a state regulated only one phase of the insurance business which would otherwise be subject to the Sherman Act (*e.g.*, rate regulation), all other phases of the business would remain subject to the Sherman Act. Merely enacting legislation authorizing rate regulation would not be sufficient to remove the full impact of the Sherman Act from the insurance business. If the statute were otherwise construed, no meaning whatever would be attributed to the all-important words of the proviso "to the extent." The only possible meaning of these words is that the Sherman Act can be made totally ineffective with respect to the insurance business only by state regulation which accomplishes the exact same result which the Sherman Act itself accomplishes.

If Congress so desired, it could have provided that the Sherman Act *shall not* apply to the business of insurance if the state regulates that business. Had Congress used such language, then any state regulation of insurance would be sufficient to prevent operation of the Sherman Act. The holding of the Courts below would be correct if the McCarran Act were so worded. However, Congress, which is fully capable of drafting legislation to express its intent, did not so provide; it provided affirmatively that the Sherman Act *shall be applicable* to the business of insurance and the only exception to its appli-

cation is those areas where the states have affirmatively acted to remove its impact. The Sherman Act is made ineffective only "to the extent" that the states act; otherwise it is fully effective.

Legislative history of McCarran Act.

The language of the McCarran Act seems crystal clear and free from ambiguity by its literal terms: "* * * the Sherman Act * * * shall be applicable to the business of insurance to the extent that such business is not regulated by State law." Only one interpretation is possible, namely, that any state which failed to legislate so as to include the scope of the Sherman Act permitted the Sherman Act to become effective again after June 30, 1948. However, the legislative history of the Act completely dispels any other interpretation.

The House Report which accompanied the basic bill which ultimately became the McCarran Act stated:

> "It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts." (H.R. Rep. No. 143, 79th Cong., 1st Sess., p. 3.)

Thus, states which desired to make the Sherman Act inapplicable to the insurance business had to enact legislation to permit conduct which otherwise would be in violation of the Sherman Act. The nature of the state action necessary to make the Sherman Act inapplicable is best disclosed by the debate in the Senate where it was made clear that affirmative action by the states covering the

same ground covered by the Sherman Act was intended by Congress. The following debate took place:

"MR. MURDOCK. So that during the moratorium it is intended, is it not, that the States *shall affirmatively step into the regulation of the insurance business?*

"MR. MCCARRAN. *That is correct.*

"MR. MURDOCK. And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective except—

"MR. MCCARRAN. Except as the States themselves have provided regulations." (91 Cong. Rec. 1442 (1945); emphasis supplied.)

"MR. PEPPER. * * * Does that mean that after January 1, 1948, the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?

"MR. MCCARRAN. The answer to that question is 'Yes'. During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts. *If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.*" (91 Cong. Rec. 1443 (1945); emphasis supplied.)

"MR. MURDOCK. I think that therein lies a very important feature of this whole matter. I agree thoroughly with the Senator from Maine that *insofar as the States step into the picture affirmatively and act*

by regulation, they may do so. As the Senator from Wyoming has said, we convey no authority, we simply recognize their right to regulate. *Insofar as they fail to cover the same ground covered by the Sherman Act and the Clayton Act, those acts become effective again.*" (91 Cong. Rec. 1444 (1945); emphasis supplied.)

This debate also shows clearly that in cases where the states, although attempting to deprive the Sherman Act of jurisdiction by legislation, do not adequately cover the field covered by the Sherman Act, then the Sherman Act still applies in those states. Thus Senator Barkley asked the following question:

> "I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, it is the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover; these acts still would apply?" (91 Cong. Rec. 1444 (1945).)

Senator McCarran, a member of the Conference Committee which drafted the final language of the bill and one of the managers of the bill on the floor, replied: "That is my interpretation" (91 Cong. Rec. 1444 (1945)).

There could be no more positive expression of Congressional purpose: the Sherman Act, after the moratorium, was to be immediately applicable in those states which failed to cover the ground covered by the Sherman Act; states were not to be allowed to divest the Sherman Act of its application by merely going through the form of

legislation—they were required to act affirmatively and to give to the public the same protection in the insurance field which the Sherman Act gives in every other field of business. The insurance industry was put on probation during the moratorium period—it was not given a pardon from the Sherman Act.

Actions by state Legislatures.

Since the McCarran Act was enacted in March, 1945, at least three states* either amended existing Sherman Act type statutes to make them apply to the insurance business or enacted new Sherman Act type statutes which apply specifically to the insurance business. The history of the amendment of the New York statute is particularly enlightening.

In 1945 the New York statute (General Business Law, § 340, commonly called the Donnelly Act) was directed at acts designed to gain a monopoly of or impose restraints upon "the manufacture, production, marketing or sale of any article or product or service used in the conduct of trade, commerce or manufacture."† The New York Attorney General, in an opinion dated February 10, 1947, ruled that insurance did not fall within any of these categories, and consequently was not subject to the Donnelly Act (1947 Ops. Atty. Gen. 200). In his opinion he stated at page 205:

> "The moratorium contained in the McCarran Act was to permit the States to enact laws which would constitute regulation precluding the general operation of the Federal anti-trust laws upon insurance and pre-

*Indiana, New York and Washington.

†The Massachusetts Sherman Act type statute (Mass. G.L. (Ter. Ed.) c. 93, Section 2) applies to articles or commodities in common use.

serve plenary State authority over that business. If this State is to foreclose both the necessity and the occasion of Federal intervention, it would obviously be preferable that it be done by action certain in its application in response to the invitation of Congress to the States to assume the responsibility of leaving no unregulated area so far as restraint of trade in the insurance business is concerned, else the Federal Government will do so. The McCarran Act declares that no Act of Congress is to be deemed applicable to insurance unless specifically so stated. In this State the business of insurance has been subject to regulation under a detailed statute specifically designed for that purpose; administered by a separate department of the State government having that exclusive function. The way is clearly pointed to specific legislative enactment as a part of the State's system of regulating the business of insurance within its borders."

Thereafter a Joint Legislative Committee, in a report dated March 12, 1948, recommended to the Legislature that the Donnelly Act be amended so as to apply specifically to insurance (New York Legislative Documents, 1948, vol. 7, Document No. 46). In replying to objections to this recommendation, the Committee stated at pages 35-36 of its report:

"Some objection was voiced by Industry to the Committee's proposal. They argued in brief that adequate regulatory power was vested in the state and in the Superintendent by the Insurance Law generally and by the enactment of the Fair Trade Bill discussed in Part III, to oust the Sherman Act from application. With that argument this Committee has not agreed. As stated, there is no regulation of action in concert

generally in the Insurance Law, and the Fair Trade Bill, while necessary, is only supplemental to a prohibitory statute.

"The Fair Trade Bill, as will later be discussed, establishes administrative procedure to check various unfair competitive practices in their incipiency and before court action becomes necessary. The Donnelly Act, as amended, is intended to break up unlawful combinations after they have been formed.

"Furthermore, as indicated, the Donnelly Act carries with it adequate punishment for violation. The most that the Superintendent or Attorney General can do under the Fair Trade Act is to obtain a cease and desist order which might well be a disproportionately weak punishment where gross harm has been done. Certainly, if the Sherman Act is to be ousted from jurisdiction, something substantial in the way of relief for an aggrieved person should be substituted.

"There is one further argument for the proposal which should be mentioned. If the Federal statutes are ousted, a person who has a just grievance, in that he has been harmed by an insurance combination engaged in an illegal concerted activity, may not go to the Federal authorities unless the matter involves boycott, coercion or intimidation. If he goes to the Superintendent and does not receive relief under the fair trade provisions of the law, he may still go to the State Attorney General for relief; or he may commence a common law action for damages. He has a choice of remedies—a choice he now possesses under Federal procedure. Certainly his rights should be no less confined under state procedure. His right to select the tribunal which most adequately protects his interests should not be restricted, for the prime intended beneficiary of the Sherman and related Federal acts

was the victim of monopoly and restraint of trade. So, too, should he be the primary concern of our complimentary [*sic*] acts."

Thereafter the New York Legislature amended the Donnelly Act to apply specifically to insurance (L. 1948, c. 502).

There is no valid basis for distinguishing the situation described above which existed in New York after the enactment of the McCarran Act from the situation which exists today in Massachusetts and thirty-one other states. Just as it was necessary for New York to amend its Donnelly Act to apply specifically to insurance, so also it was necessary for these thirty-two states to either amend their Sherman Act type statutes or adopt new Sherman Act type statutes which would apply specifically to insurance. In the absence of such legislation the business of insurance in these thirty-two states, including Massachusetts, is subject to the provisions of the Sherman Act.

B. The Sherman Act applies to the insurance business in Massachusetts.

The Courts below held that the Sherman Act is inapplicable to the "transaction" alleged in the complaint herein (a combination and conspiracy in restraint of trade) because the "transaction" is regulated by the laws of Massachusetts. The Massachusetts statutes relied on by the Courts will be considered seriatim.*

* In its opinion the District Court also referred to chapters 174A to 178 of the General Laws of Massachusetts (A30) but did not rely on any of these chapters (except 176D, discussed *infra*, pp. 25-29) to support its finding that the "transaction" here is regulated by Massachusetts statutes. Therefore these general statutes, which obviously do not regulate the insurance business in the sense intended by the McCarran Act, do not warrant consideration herein.

Massachusetts General Laws (Ter. Ed.) chapter 32A.

This chapter was enacted to provide a program of group insurance for state employees. Section 1 of the chapter specifically provides:

> "The purpose of this chapter is to provide a program of group life insurance, group accidental death and dismemberment insurance for certain persons in the service of the commonwealth, and group general or blanket hospital, surgical and medical insurance for such persons and their dependents."

Nowhere in the chapter is there any provision regulating combinations or conspiracies in restraint of trade in the insurance business, the "transaction" alleged in the complaint herein. The Courts below held, however, that, since the chapter authorized the Commission to negotiate with and purchase from insurance companies the insurance necessary to carry out the purpose of the chapter, this was sufficient regulation to oust the jurisdiction of the Federal Courts under the Sherman Act.

The fallacy of this holding is obvious. The McCarran Act provides that the Sherman Act "shall be applicable to the business of insurance to the extent that *such business* is not regulated by State law." Chapter 32A does not regulate the "business of insurance"; it does not even purport to do so. It merely authorizes the Commission to act as purchasing agent for the state. Under the plain wording of the McCarran Act, the only state legislation which will preempt the field of the Sherman Act is regulation of combinations or conspiracies in restraint of trade—a state statute which does not so regulate obviously cannot have the effect of ousting the jurisdiction of the Federal Courts under the Sherman Act.

Massachusetts General Laws (Ter. Ed.) chapter 176D.

This chapter is the Massachusetts Unfair Trade Practices Act which applies to insurance. It declares that no person in the state shall engage in an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. Eight such methods of competition or practices are defined in the Act,* none of which even remotely applies to the situation here involved. The Act also contains an "omnibus" provision (Appendix A, pp. 43-44, Section 9) under which undefined and unspecified trade practices, which the Commissioner of Insurance (a defendant here) believes after a hearing to be unfair or deceptive, may be enjoined through an action by the state Attorney General. Although the conspiracy in restraint of trade alleged in the complaint herein is not one of the practices defined in this Act, the Courts below held that "This chapter is an additional ground for holding that the transaction set forth in the complaint is one regulated by the law of Massachusetts and hence removed from the application of the Sherman Act" (A31). In this the Courts erred.

As shown above (pp. 14-23), a state statute can only oust the Federal Courts of jurisdiction of an action under the Sherman Act if it covers the same ground as the Sherman Act. It is obvious that the Massachusetts Unfair Trade Practices Act, failing as it does to define conspiracies in restraint of trade or commerce as unfair practices, has not covered the same ground as the Sherman Act, and therefore the Sherman Act is still applicable to the acts complained of in the complaint herein.

The only possible basis upon which it could conceivably be said that chapter 176D covers the same ground as the Sherman Act, in so far as it is here involved, is by reliance

* False statements; false advertising; defamation; boycott, coercion and intimidation; false financial statements; stock operations; unfair discrimination; and rebates.

on the "omnibus" provision of the Act (Appendix A, pp. 43-44, Section 9). To so hold, however, is to ignore the obvious meaning of the words of the Act, the undoubted purpose for which it was enacted and the actions of other states similarly situated.

Unfair Trade Practices Acts applying to insurance have been adopted in thirty-six states.* Twenty-seven of these Acts have "omnibus" provisions similar to those found in the Massachusetts Act. Research has failed to disclose any case interpreting the "omnibus" provision of any Unfair Trade Practice Act. These "omnibus" provisions must be construed consistently with the Acts in which they appear. They appear in Acts directed, not at combinations or conspiracies in restraint of trade (as the Sherman Act is), but at unfair practices in the insurance business similar to the unfair practices in other businesses at which the Federal Trade Commission Act is primarily directed. These are practices which in and of themselves do not constitute violations of the Sherman Act but which, if allowed to grow and develop, may at some future date become violations of the Sherman Act. The "omnibus" provisions can only be construed as extending to such practices—to hold otherwise is to extend the scope of these acts far beyond any reasonable construction of them.

There can be no doubt that the state Unfair Trade Practices Acts were enacted for one purpose and one purpose only—to prevent the Federal Government from regulating the same practices under the Federal Trade Commission Act. Under the McCarran Act, after the moratorium the Federal Trade Commission Act (in addition to the Sherman and Clayton Acts) would apply to the insurance business to the extent that the states failed to enact

* States which do not have such statutes are Alabama, California, Delaware, Idaho, Illinois, Missouri, Montana, Oregon, North Dakota, Rhode Island, Texas and Vermont.

legislation covering the same field. The states which have such statutes may have succeeded in ousting the Federal Trade Commission from jurisdiction over the insurance business. *The American Hospital & Life Insurance Company* v. *Federal Trade Commission*, 1957 (C.C.H.) Trade Cases, par. 68,675 (5th Cir., April 9, 1957). *National Casualty Co.* v. *Federal Trade Commission*, 25 U.S. Law Week 2597 (6th Cir., June 6, 1957). However, this does not mean that the same statutes are effective to preempt the field of the Sherman Act, and the "omnibus" provisions of these statutes should not be construed to give them this effect. To do so is to ignore the obvious meaning of the McCarran Act. The Federal Trade Commission Act was designed to supplement the Sherman Act by establishing a purely administrative procedure to check various unfair practices in their incipiency and before Court action became necessary. It established preventive, not compensatory, corrective or punitive machinery such as is provided by the Sherman and Clayton Acts. If all that Congress intended when it enacted the McCarran Act was that there be an administrative procedure to check in their incipiency unfair practices in the insurance business it would have made only the Federal Trade Commission Act effective at the end of the moratorium. It did not do so; it made the Sherman and Clayton Acts also effective at the same time. Obviously this means that to prevent the Sherman and Clayton Acts from becoming effective at the end of the moratorium the states had to enact legislation covering the same ground as the Sherman and Clayton Acts, just as they enacted Unfair Practices Acts covering the same ground as the Federal Trade Commission Act. The "omnibus" clause in the Act creating an administrative procedure cannot fill the void caused by the failure to enact legislation establishing compensatory, corrective or punitive

machinery such as is provided by the Sherman and Clayton Acts.

Furthermore, the fact that state Unfair Trade Practices Acts which include "omnibus" provisions do not preempt the field of the Sherman Act is forcefully demonstrated by the statutes of other states. Eight states[2] having Unfair Trade Practices Acts applying to insurance which include "omnibus" provisions similar to that found in the Massachusetts Act *also* have Sherman Act type statutes applying specifically to insurance. If "omnibus" provisions were sufficient to preempt the field of the Sherman Act, obviously Sherman Act type statutes applying to insurance were unnecessary. But the Legislatures of eight states recognized that both types of legislation were necessary. The manifest reason is that an "omnibus" provision does not preempt the field of the Sherman Act. The Joint Legislative Committee in New York which conducted an exhaustive study of this subject concluded that both types of statutes were necessary because the Unfair Trade Practices Act was "only supplemental to a prohibitory statute" and that, "if the Sherman Act is 'to be ousted from jurisdiction, something substantial in the way of relief for an aggrieved person should be substituted" (*supra*, p. 22).

To make the Sherman Act inapplicable in states which have adopted only an Unfair Trade Practices Act is to ignore the plain language of the McCarran Act and Congressional intent that, unless the states adequately cover the field covered by the Sherman Act, then the Sherman Act remains effective. It creates the very situation which Congress sought to avoid, *i.e.*, the absence of any type of prohibition, either state or Federal, against monopolies or

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[2] Arkansas, Georgia, Iowa, Kansas, Mississippi, Nebraska, New York, South Carolina. In another three states (Indiana, Utah, Washington) the Unfair Practices Act specifically includes Sherman Act type violations.

restraints of trade in the insurance business. This Court should review this question of vital importance and establish clearly that, in the absence of definite, specific state legislation covering the same field as the Sherman Act, a person injured by a violation of the Sherman Act can resort to the Federal Courts for relief.

II.

THE HOLDING THAT SECTION 4 OF THE CLAYTON ACT DOES NOT AFFORD A REMEDY TO PETITIONER IS IN DIRECT CONFLICT WITH DECISIONS OF COURTS OF APPEALS FOR OTHER CIRCUITS AND DISREGARDS A RECENT ADMONITION OF THIS COURT.

The Courts below held that the injuries set forth in plaintiff's complaint "seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15 [Section 4 of the Clayton Act]" (A32). The statute cited does not establish any "class of indirect and speculative injuries"; to the contrary, it expressly states in the broadest possible language that "*Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *" (Emphasis supplied.) Regarding this language, the Court in *Röschlau v. Phister Mfg. Co.*, 125 F. 2d 417 (7th Cir., 1942) said at page 419:

> "The language of the statute is general and all inclusive. It includes any person who shall be injured in his business or property."

This Court, as recently as February of this year, has warned that the Courts should not add limitations to burden private litigants in actions under the antitrust laws "beyond what is specifically set forth by Congress in

those laws". (*Radovich v. National Football League*, 352 U.S. 445, 454). The holding below completely disregards this admonition by limiting the category of persons who may maintain private actions under the antitrust laws despite the fact that Congress in the statute quoted above has expressly provided that "any person" injured may sue.

The Courts below, in holding that plaintiff's injuries fall in "the class of indirect and speculative injuries" relied on *Melrose Realty Co., Inc., v. Loew's Inc.*, 234 F. 2d 518 (3d Cir., 1956), and *Productive Inventions, Inc., v. Trico Products Corp.*, 224 F. 2d 678 (2d Cir., 1955), both of which followed the rationale of *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (D.C. E.D. Pa., 1953); aff'd on opinion below 211 F. 2d 405 (3d Cir., 1954); cert. den. 348 U.S. 828 (1954). This judicial limitation on the persons who may sue is based on a theory that, because of the severity of the penalty provided in the antitrust laws, some line must be drawn to prevent windfalls to plaintiffs and excessive liabilities on defendants who violate the antitrust laws. *Harrison v. Paramount Pictures, Inc., supra. Snow Crest Beverages, Inc., v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D.C. D. Mass., 1956).

However, this theory has been expressly rejected by the Court of Appeals for the Seventh Circuit in *Rockland v. Plastex Mfg. Co.*, 125 F. 2d 417 (1942), where the Court at page 420 stated:

> "We may not by what seems to us a strained and unjustified limitation bar plaintiff from the statutory remedy. 'Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law': Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241."

A similar conclusion was reached by the same Court in *Kansas Building Corporation v. Loew's Incorporated*, 1957 (C.C.H.) Trade Cases, par. 68,725 (7th Cir., May 21, 1957), where the Court stated at page 72,963:

> "In these circumstances we do not believe that recovery should be denied on some vague notion that 'a line must be drawn'. We therefore decline to follow the rule laid down by the Third Circuit in the *Harrison* and *Maltzes* decisions."

The Court of Appeals for the Ninth Circuit, in *Steiner v. 20th Century-Fox Film Corp.*, 232 F. 2d 190 (1956), also refused to follow the rule of the *Harrison* case, *supra*, in a factual situation which was indistinguishable.

Thus we have a situation where plaintiffs in private antitrust suits in the First, Second and Third Circuits are being deprived of relief while plaintiffs similarly situated in the Seventh and Ninth Circuits are allowed to recover. The time has arrived for this Court to settle this conflict between the Circuits and to resolve this important question in the field of private antitrust law. We submit that the holding below should be rejected and that the rule established in the Seventh and Ninth Circuits should be approved, for this is the only rule which is consistent with the language of the statute (15 U.S.C. § 15), with encouraging respect for the antitrust laws and with the clear principle recently enunciated by this Court in the *Radovich* case, *supra*, that the Courts should not add limitations to burden private antitrust litigants beyond those specifically provided by Congress.

Even if this Court were to approve the limitation adopted by the First, Second and Third Circuits, the holding below that plaintiff's injuries fall in the special class of indirect injuries is erroneous. Plaintiff here has alleged that he is an independent insurance broker who was injured by a con-

spiracy in violation of the Sherman Act. It has been held repeatedly that a sales agent may recover lost commissions in an action under the antitrust laws. *Rosland v. Phister Mfg. Co.*, 125 F. 2d 417 (7th Cir., 1942). *Times v. General Outdoor Advertising Co.*, 171 F. 2d 487 (2d Cir., 1948). *Mc Whirter v. Monroe Calculating Mach. Co., Inc.*, 76 F. Supp. 456 (D.C. W.D. Mo., 1948). *Klein v. Sales Builders, Inc.*, 1950-1951 (C.C.H.) Trade Cases, par. 62,950 (D.C. N.D. Ill., 1951). Plaintiff here is in the same position as the sales agent. He is not in the same category as the plaintiffs in the cases cited by the Court below. Thus in the *Metrose Realty Co.* case, *supra*, p. 30, plaintiff, the non-operating lessor of a movie theater, by his lease had relinquished all present interest in the theater; in the *Practice Inventions* case, *supra*, p. 30, plaintiff patentee had granted to another an exclusive license upon a royalty basis. Plaintiff here has not relinquished any interest in his insurance brokerage business; he was in active direct competition with the defendant insurance companies. It was clearly erroneous to place him in the same category as plaintiffs, who had voluntarily relinquished their present property rights, and thereby deprive him of his right to recover under the antitrust laws.

III.

DISMISSAL OF THE COMPLAINT AGAINST DEFENDANT COMMISSION MEMBERS WAS THE RESULT OF AN ERRONEOUS APPLICATION OF DECISIONS OF THIS COURT.

The holding below, dismissing the complaint against defendant Commission members only, is based on an erroneous application of decisions of this Court. Under it, members of a state commission would be forever free to violate the antitrust laws merely by virtue of their membership on the commission. Such is not the interpretation of the Eleventh Amendment to the Constitution of the

United States as expressed by this Court, since the immunity of a state from suit does not extend to state officers when their activities exceed the authority granted them under the state law. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). In that case this Court stated at page 297:

> "The Eleventh Amendment, which denies to the citizen the right to resort to a Federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer."

The complaint here alleges and the District Court assumed that defendant Commission members conspired with other defendants in violation of the Sherman Act. Nowhere in chapter 32A of the General Laws of Massachusetts has the Legislature authorized the members of the Commission to enter into a conspiracy in connection with their duties of purchasing insurance and administering a private insurance plan for employees of the Commonwealth.

This is the basic distinction between this case and *Parker v. Brown*, 317 U.S. 341 (1943), relied upon by the Courts below. In that case the Court found that the California Legislature, in enacting the California Agriculture Prorate Act, specifically authorized a scheme of state action imposing restrictions upon the sale within the state of certain crops, the purpose and effect of which was to raise and maintain prices and eliminate competition between producers. Here we have no such state legislation authorizing official action in violation of the Sherman Act. In the absence of such authorization, the defendants are individually liable for their acts.

Since there was no state legislation authorizing defendant Commission members to violate the Sherman Act, the

Courts below erred in holding that the action was in substance one against the state. It is well settled that whether or not an action against state officials is in substance an action against the state depends on who is the real party in interest, and this is determined, not by the names of the parties of record, but by the result or impact of the judgment which will be obtained. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386 (1902). *Ex parte Ayers*, 123 U.S. 443, 489-491 (1887). *Hagood* v. *Southern*, 117 U.S. 52, 67 (1886). Here, a judgment against defendant Commission members would be one against them in their individual capacities and not as state officials; the state could not be held liable for payment of any judgment obtained.

Finally, even if the Courts below correctly held that respondent Commission members cannot be held individually liable for conspiring with the other respondents to the detriment of petitioner, this holding does not affect the status of the other respondents. As to them, the action may be maintained, for they cannot hide behind the cloak of sovereign immunity which applies, if at all, only to respondent Commission members.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEO T. KISSAM,

Counsel for Petitioner.

Of Counsel:

KISSAM & HALPIN,

New York, New York,

DEVINE, YORK & VOLPE,

Boston, Massachusetts.

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Appendix A.

Massachusetts Statutes.

MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 93.

* * * * * * * * *

SECTION 2. [*Monopolies and Discriminations in the Sale of Articles, etc., in Common Use Prohibited.*] Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

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MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 32A.

(Inserted by Acts of 1955, Chapter 628, and amended by Acts of 1956, Chapter 582.)

SECTION 1. [*Purpose of Chapter.*] The purpose of this chapter is to provide a program of group life insurance, group accidental death and dismemberment insurance for certain persons in the service of the commonwealth, and group general or blanket hospital, surgical and medical insurance for such persons and their dependents.

SECTION 2. [*Definitions.*] The following words and phrases as used in this chapter shall have the following meanings:—

(*a*) "Commission", the state employees' group insurance commission.

(*b*) "Employee", any person in the service of the commonwealth, whether such person be employed, appointed or elected by popular vote; provided, the duties of such person require that his time be devoted to the service of the commonwealth during the regular work week of permanent employees, except that persons elected by popular vote will be considered employees during the entire term for which they are elected, regardless of hours devoted to the service of the commonwealth. By way of illustration but not limitation, a person appointed or elected by popular vote shall include employees of the general court, state officials, constitutional officers and members of the general court, but shall in no event be construed to include members of the judiciary paid in whole or in part from other than state funds, seasonal employees or emergency employees. A determination by the commission that a person is eligible for participation in the plan of insurance shall be final and shall be binding on all parties.

(*c*) "Employer", the commonwealth of Massachusetts.

(*d*) "Dependents", an employee's spouse and an employee's unmarried children under nineteen years of age.

(*e*) A person is deemed to work a regular work week of permanent employment when he meets the applicable requirements of section five of chapter eight, sections thirty and thirty A of chapter one hundred and forty-nine, or any general or special law pertaining to a regular work week of permanent employment; or whose duties require no less than twenty hours, regularly, in the service of the commonwealth during the regular work week. In the event that a department head is unable to apply the terms defined

above to a specific set of circumstances all facts relative thereto shall be submitted to the commission for a determination of eligibility and such determination shall be final.

SECTION 3. [*State Employees' Group Insurance Commission; Members, Executive Secretary, Rules and Regulations.*]. There shall be established within the commission on administration and finance, but not under its jurisdiction, a special unpaid commission, to be known as the state employees' group insurance commission, consisting of the commissioner of administration, the commissioner of insurance, and three members to be appointed by the governor, with the advice and consent of the council. At least one member appointed by the governor shall be a state employee, and not more than two appointive members of the commission shall be members of the same political party. No member appointed by the governor shall be an insurance agent, broker, employee or officer of any insurance company. Upon the expiration of the term of office of any appointive member, his successor shall be appointed in like manner for a term of three years. The commission shall be provided with suitable offices in the state house and may, subject to appropriation, incur expenses and appoint an executive secretary and such other employees as may be necessary to administer the provisions of this chapter. There shall be paid by the commonwealth to each appointive member of said commission the necessary expenses actually incurred in the discharge of his official duties. The executive secretary shall be the executive and administrative officer of the commission and shall not be subject to the provisions of chapter thirty-one. The commission shall adopt such reasonable rules and regulations as may be necessary for the administration of this act and shall make an annual report to the governor and to the general court which shall be in such form as to enable employees to

understand the benefits available from the insurance program, including the cost thereof.

SECTION 4. [*Insurance Policies, etc.*] The commission shall negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations, a policy or policies of group life and accidental death and dismemberment insurance covering persons in the service of the commonwealth, and group, general or blanket insurance providing hospital, surgical and medical benefits covering persons in the service of the commonwealth and their dependents, and shall execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth. Said commission may negotiate a contract for such term not exceeding three years as it may, in its discretion, deem to be the most advantageous to the commonwealth: provided, however, that the portion of the cost of the premium per month to be borne by the commonwealth shall not exceed the estimated monthly cost for which funds have been appropriated by the general court for the then current fiscal year.

For the purposes of this chapter, any savings bank authorized to engage in the insurance business in accordance with chapter one hundred and seventy-eight, and any non-profit hospital service corporation or non-profit medical corporation organized under chapter one hundred and seventy-six A or one hundred and seventy-six B shall be and is hereby authorized to enter into a reinsurance agreement as herein provided in the same manner as any other insurance company.

SECTION 5. [*Insurance of State Employees Under Policies Regulated.*] Each employee shall be automatically insured for all insurance coverages provided under said

policy or policies, commencing on the date he first becomes eligible or on the effective date of such coverage or coverages, including dependent benefits, whichever last occurs; provided, that any employee desiring not to be so insured, shall, on an appropriate form prescribed by the commission, give written notice to the commission that he is not to be insured for any of such coverages, including dependent benefits, provided under such policy or policies. Such notice shall be mailed to the office of the commission at least thirty days prior to the effective date of the policy or policies insuring said employee. If the employee fails to give notice as herein provided or, in the event an employee desires to terminate his insurance, he may withdraw, and such insurance benefits shall cease to be effective on the date to which the premium has been paid. In determining said date, payroll deductions or direct payments on behalf of the employee shall continue to be made until the expiration of fifteen days from the receipt of notice of withdrawal by the commission. Every policy, whether original or renewal, shall provide, in the case of employees now covered by group insurance benefits, protection by continuing uninterrupted coverage without regard to waiting periods for benefits.

SECTION 6. [*Amounts of Insurance, Benefits, etc., Regulated.*] The amount of group life insurance on each employee shall be two thousand dollars, and the amount of group accidental death and dismemberment insurance on each employee shall be two thousand dollars. The amount of the hospital, surgical and medical benefits to be provided each employee and his dependents shall be determined by the commission subject to the provisions of section four.

SECTION 7. [*Information to Be Furnished by Employees.*] Each employee to whom this chapter applies shall furnish the commission, in such form as it shall prescribe, such information as is necessary to enroll himself, or him-

self and his dependents, under the policy or policies of insurance.

SECTION 8. [*Salary Withholdings, etc.*].

(*a*) With respect to any period of insurance which is in effect for an employee, there shall be withheld from each payment of salary or wages of such employee fifty per cent of the premium for such insurance and the commonwealth shall contribute the remaining fifty per cent of the said premium.

(*b*) If an employee is entitled to receive, during a calendar month, salary, wages or other compensation and the premium has not been withheld from said salary, wages or other compensation, he may continue his insurance in effect by paying directly to the commission the premium which would otherwise have been deducted from his salary, wages or other compensation. If an employee is not entitled to receive salary, wages or other compensation for a calendar month, he shall for the purposes of this chapter be deemed to have been granted a leave of absence without pay and shall make payment for the entire cost of his insurance to the commission as aforesaid and there shall be no contribution by the commonwealth for such employee's insurance. If an employee is not entitled to receive salary, wages or other compensation for any calendar month, due to illness of such employee and not because of illness of his immediate family, for purposes of this chapter he shall be deemed to have been granted sick leave without pay, and subject to the rules and regulations of the commission, said employee shall make payment of fifty per cent of the cost of his insurance to the commission and the commonwealth shall contribute the remaining fifty per cent of said premium.

(*c*) All amounts withheld from an employee's salary or wages as provided in paragraph (*a*) and all amounts withheld from pensions or retirement allowances under the

provisions of section nineteen of chapter thirty-two shall be forwarded by the department, institution, or other agency responsible for the payment of employee salaries and wages or pensions and retirement allowances to the commission. The commission, from funds appropriated therefor, shall authorize payment of the contribution of the commonwealth as provided in said paragraphs (*a*) and (*b*), which, together with the employee payments, shall be paid at least once each month to the carrier or carriers entitled to the premium.

SECTION 9. [*Dividends, Refunds, etc.*] Any dividend or other refunds or rate credits shall inure to the benefit of the commonwealth, and shall be deposited with the treasurer and receiver-general of the commonwealth and shall be applied to the cost of such insurance.

SECTION 10. [*Retirement or Termination of Employment, Effect on Policy, etc.*] The commission shall require that, on retirement of an employee, the policy or policies of insurance shall provide that the group life coverage of such employee shall be reduced fifty per cent and the group general or blanket insurance providing hospital, surgical and medical benefits shall be continued, except that the employee shall pay the entire average premium per one thousand dollars for group life coverage, and for the hospital, surgical and medical benefits the entire group premium applicable for said employee or for said employee and his dependents. Any policy or policies issued under this chapter shall provide that, on termination of employment, an employee shall be entitled to convert his insurance to an individual type of policy, subject to the provisions of section one hundred and thirty-four of chapter one hundred and seventy-five with respect to life insurance, and subject to the requirements of the commission with respect to the other insurance coverages provided in this chapter. No employee will be permitted to convert his insurance

on separation from service more than one time if such converted insurance would result in a greater amount of insurance than is provided in section six.

MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 176D (INSERTED BY ACTS OF 1947, c. 559).

SECTION 1. [*Purpose of Chapter.*] The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

* * * * * * * * *

SECTION 3. [*Prohibited Trade Practices.*] No person shall engage in this commonwealth in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

SECTION 4. [*Unfair Methods of Competition and Unfair or Deceptive Acts and Practices Defined.*]

(a) The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:—

(1) [*Misrepresentations and False Advertising as to Policy Contracts.*] * * *

(2) [*False Information and Advertising Generally.*] * * *

(3) [*Defamation.*] * * *

(4) [*Boycott, Coercion or Intimidation.*] * * *

(5) [*False Financial Statements.*] * * *

(6) [*Stock Operations or Contracts Promising Profits as Inducement to Insurance.*] * * *

(7) [*Unfair Discrimination.*] * * *

(8) [*Rebates, etc.*] * * *

SECTION 5. [*Investigative Power of Commissioner.*] The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this commonwealth in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section three.

* * * * * * * * * * * *

SECTION 9. [*Procedure as to Unfair Methods of Competition, etc., Which Are Not Defined.*]

(*a*) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaged in this commonwealth in any method of competition or in any act or practice in the conduct of such business which is not defined in section four, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by the commissioner in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section six. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(*b*) If such report charges a violation of this chapter and if such method of competition, act or practice has

not been discontinued, the commissioner may, through the attorney general, at any time after thirty days after the service of such report cause a petition to be filed in the supreme judicial court to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite.

(c) A transcript of the proceedings before the commissioner, including all evidence taken and the report and findings, shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceedings by the commissioner with respect thereto are to the interest of the public and that the findings of the commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

SECTION 10. *Judicial Review on Petition of Interested Person.* If the report of the commissioner does not charge a viola-

tion of this chapter, then any intervenor in the proceed[illegible] may, within thirty days after the service of such report, cause a petition to be filed in the supreme judicial court for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this chapter.

SECTION 11. [*Penalty.*] Any person who violates a cease and desist order of the commissioner under section seven after it has become final, and while such order is in effect, shall forfeit and pay to the commonwealth a sum not to exceed one thousand dollars for each violation, which may be recovered in a civil action. In determining the amount of the penalty the question of whether the violation was wilful shall be taken into consideration. Nothing herein shall be construed as limiting a court in enforcing its own orders.

SECTION 12. [*Powers of Commissioner Additional to Other Powers to Enforce Penalties, etc.*] The powers vested in the commissioner by this chapter shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

. . . . . .

SECTION 14. [*Invalidity in Part, Effect.*] If any provision of this chapter, or the application of any provision to any person or circumstances, shall be held invalid, the remainder of the chapter, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Appendix B.

STATES HAVING NO SHERMAN ACT TYPE STATUTE APPLICABLE TO INSURANCE BUSINESS.

1. States having no Sherman Act type statute.

Delaware	Nevada	Rhode Island
Kentucky	New Jersey	Vermont
Maryland	Pennsylvania	West Virginia

(Kentucky and Maryland have constitutional provisions to the effect that monopolies and trusts are contrary to public policy. Vermont has legislation authorizing judicial dissolution of a corporation unreasonably restraining trade.)

2. States having Sherman Act type statutes not specifically applicable to insurance business.

Alabama: Code of Alabama, 1940, Title 37, c. 6, §§ 106-108; Title 7, c. 4, art. 5, §§ 124, 125 (limited to articles and commodities).

Colorado: Colorado Laws of 1957, Senate Bill No. 209, approved and effective, April 22, 1957.

Connecticut: General Statutes of Connecticut, 1949, Title 44, c. 424, § 8612 (limited to ice, coal or other necessities).

Florida: Florida Statutes Annotated, Title 31, c. 542, § 542.01 *et seq.*

Idaho: Idaho Code, Title 48, c. 1, § 48-101 *et seq.* and Title 18, c. 52, § 18-5201.

Illinois: Smith Hurd Illinois Annotated Statutes, c. 38, § 369 *et seq.* (limited to articles of merchandise and commodities).

Louisiana: West's LSA-Revised Statutes, Title 51, Part IV, § 121 *et seq.*

Maine: Revised Statutes of Maine, 1954, c. 137, § 13 [6]; c. 53, §§ 81-83.

Massachusetts: Massachusetts General Laws (Ter. Ed.), c. 93, § 1 *et seq.* (limited to articles and commodities in common use).

Michigan: Michigan Compiled Laws, 1948, c. 750, § 750.151 *et seq.*; §§ 750.537-750.560.

Minnesota: Minnesota Statutes Annotated, Part 5, c. 623, §§ 623.01-623.07 (limited to articles of trade, manufacture or use).

Montana: Revised Codes of Montana, 1947, Annotated, Title 94, c. 11, § 94-1104 *et seq.*

New Hampshire: New Hampshire Revised Statutes Annotated, 1955, Title 31, c. 356, §§ 356.1-356.9.

New Mexico: New Mexico Statutes, 1953, Annotated, c. 49, art. 1, §§ 49-1-1 through 49-1-4.

North Carolina: General Statutes of North Carolina, c. 75, § 75-1 *et seq.*

North Dakota: North Dakota Revised Code, 1943, Title 51, c. 51-08, § 51-0801 *et seq.*

Ohio: Page's Ohio Revised Code Annotated, Title 13, § 1331. § 1331.01 *et seq.*

Oklahoma: Oklahoma statutes Annotated, Title 79, c. 1, § 1.

South Dakota: South Dakota Code of 1939, Title 13, c. 13.18, § 13.1801 *et seq.*

Tennessee: Tennessee Code Annotated, Title 69, c. 1, § 69-101 *et seq.* (limited to the sale of imported articles or articles of domestic growth or raw material).

Virginia: Virginia Code, 1950, Title 59, c. 5, § 59.20-1 *et seq.*

Wisconsin: Wisconsin Statutes, 1951, c. 133, § 133.01 *et seq.*

Wyoming: Wyoming Compiled Statutes, 1945, Annotated, c. 39, art. 4, § 39-401 *et seq.*

Appendix C.

STATES HAVING SHERMAN ACT TYPE STATUTE APPLICABLE TO INSURANCE BUSINESS.

Arizona: Arizona Revised Statutes, Annotated, Title 44, c. 10, art. 1, § 44-1401.

Arkansas: Arkansas Statutes, 1947, Annotated, Title 70, c. 1, § 70-100 *et seq.*

California: Deering's California Codes, Annotated, Business and Professions, Part 2, c. 2, arts. 1-3; § 16700 *et seq.* (held applicable to insurance companies in *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P. 2d 867 (1946)).

Georgia: Georgia Code Annotated, Title 2 (Constitution art. IV, § IV) c. 2-27, § 2-2701; and Title 56, c. 2, § 56-219 (Anti-Compact Law).

Indiana: ~~Burns'~~ Indiana Statutes Annotated, volume 5, Part 2, Title 23, § 23-101 *et seq.*; and volume 8, Part 1, Title 39, § 39-5305 and 39-5304 (Unfair Trade Practices Act in insurance with Sherman Act type coverage).

Iowa: Iowa Code Annotated, Title 28, c. 553, § 553.1 *et seq.*; and c. 515, § 515.131 (Anti-Compact Law).

Kansas: Kansas General Statutes, 1949, Part 2, c. 50, 50-101 *et seq.*

Mississippi: Mississippi Code, 1942, Annotated, Title 8, c. 1, § 1088 *et seq.* (held applicable to fire insurance companies in *Fire Insurance Companies v. State of Mississippi*, 75 Miss. 24 (1897)).

Missouri: Vernon's Annotated Statutes, c. 416, § 416.010 *et seq.* (limited to fire, lightning and storm insurance).

Nebraska: Nebraska Revised Statutes, 1943, c. 59, § 59-101 *et seq.* (§ 59-101, applicable to insurance, is a definition without a context; § 59-301 applies to fire insurance companies only; § 59-401 was held applicable to the business of insurance in *State v. American Surety Co.*, 9 Neb. 22).

New York: McKinney's Consolidated Laws of New York, Annotated, book 19, art. 22, § 349 *et seq.*

Oregon: Oregon Revised Statutes, 1953, Title 56, § 736.615 (Anti-Compact Law).

South Carolina: South Carolina Code of Laws, 1952, Title 66, c. 2, arts. 1 and 2, § 66-51 *et seq.*

Texas: Vernon's Texas Civil Statutes, Title 126, art. 5429 *et seq.*; Texas Penal Code, Title 19, c. 3, Art. 1632 *et seq.*

Utah: Utah Code Annotated, 1953, Title 20, c. 1, § 20-1-1 *et seq.*, and Title 31, c. 27, § 31-27-1 *et seq.* (Anti-Compact Laws).

Washington: Constitution, art. 12, § 22; and Revised Code of Washington Title 43, c. 43.30, § 43.30.010 *et seq.* (Anti-Compact Law).